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No. 90-683

In The

Supreme Court of the United States

October Term, 1990

THE GEORGIA MARBLE COMPANY,

Petitioner,

v.

WALTER CECIL WHITLOCK AND
COLEEN J. WHITLOCK,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Georgia

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

While much of Petitioner's Statement of the Case is argumentative and does not fairly reflect the record below, no objection to this statement is made herein since the Petition raises only the narrow issue of the constitutionality of the Georgia Mineral Interest Statute.

SUMMARY OF THE ARGUMENT

The Georgia Mineral Interest Statute does not violate due process because it is clearly a self-executing statute. In fact it is more self-executing than the Indiana Statute already found constitutional in *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 733 (1982).

The Georgia Mineral Interest Statute does not constitute taking of property without just compensation. It has already been well established that this statute is not a taking at all, but rather a conditioning of property rights upon certain pre-requisites.

ARGUMENT

The Petition submits two issues which Petitioner claims warrant this Court's review. However, the issues presented have already been decided adversely to Petitioner in previous decisions of this Court and no further review of the Georgia Mineral Interest Statute is warranted.

I. THE GEORGIA STATUTE DOES NOT VIOLATE DUE PROCESS.

At the outset this Court should note that the constitutionality of this statute has already been unsuccessfully challenged in a previous case in the Georgia Supreme Court. *Hayes v. Howell*, 251 Ga. 580, 308 S.E.2d 170 (1983). There the Georgia Supreme Court analyzed the purpose and effect of this statute as follows:

> The Code section challenged here was also passed under the General Assembly police power. It serves dual purposes: to encourage the use of the State's mineral resources and the collection of taxes, or to encourage the use of land free of interference by holders of mineral rights who neither use nor pay taxes upon them. As such it is a reasonable exercise of the police power. By the same token, the statute itself does not divest the mineral owner of its rights; it conditions the retention of those rights upon the requirements of either using them or paying taxes upon them for the public benefit.

251 Ga. at 586, 308 S.E.2d at 176.

Respondents do not dispute the legal interpretation Petitioner advances for *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 733 (1982), and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340 (1988). However, Petitioner's analysis of the application of those decisions to the statute in question is seriously flawed. If Petitioner is correct in that *Pope* limits the application of *Texaco* to only "self-executing statutes", there is no reason for this court to grant certiorari to consider the Georgia statute. When one compares the

Georgia statute to the Indiana statute ruled upon in *Texaco*, it is apparent that the Georgia statute is more self-executing. As pointed out by Petitioner, the Indiana statute allowed owners of multiple interest rights to receive a sixty day notice from the county and a time to cure prior to lapse. This feature is not present in the Georgia statute. There is no state action involved in the Georgia statutory scheme except the clerk's ministerial job of accepting the filing of a declaratory judgment complaint from the owner of the fee.

Like the Indiana Legislature, the Georgia Legislature found good reasons why it should condition the ownership of mineral rights in Georgia upon either the actual mining or attempted mining of the minerals or the payment of taxes upon them. If the owner of the mineral rights chooses to do nothing for a period of seven years, then the Georgia Legislature deemed it important that land titles in Georgia not continue to be burdened by obscure mineral rights. Large mining operations, such as Petitioner here, should clearly know what their obligations are under Georgia law, if they wish to preserve mineral rights. Petitioner's problem in these facts is not that it did not receive due process, but rather that it simply went about attempting to preserve its mineral rights in the wrong manner. As such, these facts clearly do not present a good test case for further due process decisions in the area of mineral rights statutes.

II. THE GEORGIA MINERAL RIGHTS STATUTE IS NOT AN UNCONSTITUTIONAL TAKING OF PROPERTY.

The Georgia Mineral Interest Statute does not provide a statutory scheme for the taking of property. It does

not "divest the mineral owner of his right; it conditions the retention of those rights upon the requirements of either using them or paying taxes upon them for the public benefit." *Hayes v. Howell*, 251 Ga. at 586, 308 S.E.2d at 170. Unlike *Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076, (1987), here, the government is taking nothing from Petitioner. It is merely telling Petitioner that it cannot maintain mineral rights in Georgia unless it actually attempts to mine them or pays taxes on them. If it fails to do so, the rights revert back to the owner of the fee.

Even if this were viewed as a taking, it is proper exercise of police power under the espoused purposes of the act. It is hardly burdensome to require holders of mineral rights to either work these rights or pay taxes upon them. When this *de minimus* burden is compared to the considerable public policy benefit explained in *Hayes v. Howell*, there can be no question as to the constitutionality of this statutory scheme.

CONCLUSION

For all the within and foregoing reasons, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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